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v.

MOHD AL-HAFIES NORDIN & ORS

HIGH COURT MALAYA, SHAH ALAM

B

YEOH WEE SIAM JC

[CRIMINAL TRIAL NO: 45-83-2005]

20 AUGUST 2009

CRIMINAL LAW: *Sentencing - Mitigation - Victim died from multiple injuries - Section 323 Penal Code - Section 304(b) Penal Code - Young and first offenders - Pleading guilty - Whether appropriate to bind over under s. 294 Criminal Procedure Code - Whether entitled to discount in sentencing*

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This was a case arising from a single incident which involved four accused persons and leading to the death of one Mohammad Fitri bin Tajuddin ("the deceased"). On 26 April 2005, the first accused was involved in a struggle and fistfight with the deceased in the parking lot of Flat Blok 4, Jalan PJS 6/3B, Kampung Lindungan, Petaling Jaya. The second accused who is a friend of the first accused came to his assistance by wresting a motorcycle helmet from the hands of the deceased and hitting the deceased with it on the head. The helmet which fell to the ground was then picked up by the third accused who continued to strike the deceased with it on the head until the deceased fell to the ground. The first, second and third accused thereafter left the scene of the incident. Whilst the deceased remained lying on the ground, the fourth accused arrived on the scene and continued to hit and kick the deceased and thereafter departed from the scene. The deceased was then rushed to the hospital where he died from multiple injuries a few days later. Based on the evidence, it was determined that the first and fourth accused deliberately had caused injuries on the deceased and was charged under s. 323 of the Penal Code. It was further determined that the second and third accused had committed homicide upon the deceased and were charged under s. 304(b) of the Penal Code. All four accused, who were first offenders and aged 20 years, 21 years, 22 years and 19 years respectively at the material time, pleaded guilty to the charges against them and made pleas in mitigation to the court for leniency in their sentencing. Bearing in mind these facts, questions hence arose as to whether a discount ought to be accorded in terms of the sentence(s) to be passed, and in any case, whether an order under s. 294 of the Criminal Procedure Code could appropriately be made by the court.

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A Held:

- B** (1) Despite the fact that the four accused are young and first offenders with no prior convictions, it would not be possible to bind them over under s. 294 of the Criminal Procedure Code (“CPC”) considering the seriousness of the offence wherein the victim had lost his life in the incident. (para 40)
- C** (2) The guiding principle of the 1/4 to 1/3 discount given to an accused who pleads guilty is not sacrosanct and still subject to judicial discretion. The court has to do the fine balancing act of giving justice to the victim and his loved ones for the loss of an innocent life, and of setting an example to society that crimes of this nature are considered grave offences and the offenders must be sufficiently punished for deterrent effect. At the same time the court has the duty to take into account the pleas in mitigation and the fact that the four accused are now genuinely remorseful. (para 41)
- D** (3) Accordingly the first and fourth accused are each sentenced to one year imprisonment, being the maximum punishment provided under s. 323 of the Penal Code, with effect from the date of their arrest. To give a discount of 1/4 to 1/3 out of the maximum one year imprisonment provided under this section would render the whole sentence a mockery given that the victim died due to serious multiple injuries from the fight. (para 42)
- E** (4) Since the maximum punishment under s. 304(b) of the Penal Code is ten years’ imprisonment, a certain amount of discount that is slightly higher than the recommended 1/4 or 1/3 discount can be given considering that they had pleaded guilty. The sentence however, should remain adequate and commensurate with the nature and gravity of the offence and sufficiently deterrent to the public. Accordingly the second and third accused are each sentenced to seven years’ imprisonment with effect from the date of their arrest. (para 43)
- F**
- G**
- H Case(s) referred to:**
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC (*refd*)
PP v. Ravindran & Ors [1992] 1 LNS 47 HC (*refd*)
Sau Soo Kim v. PP [1975] 1 LNS 158 FC (*refd*)
Tukiran Taib v. PP [1955] 1 LNS 166 HC (*refd*)
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Legislation referred to:

Criminal Procedure Code, s. 294

Penal Code, ss. 302, 304(a), (b), 323

*For the prosecution - Isa Hj Hassim DPP**For the 1st, 2nd & 3rd accused - Dato' Shukri Hj Mohamed; M/s Wan Haron Sukri & Nordin**For the 4th accused - Dato Mohammad Shafee Abdullah (Badrul Munir Bukhari with him); M/s Shafee & Co**Reported by Mohammed Tariq Ismail***JUDGMENT****Yeoh Wee Siam JC:****Joint Trial On Amended Charge**

[1] Mohd Al-Hafies bin Nordin ("the first accused"), Mohd Shahrul bin Mohd Salleh ("the second accused"), Shahrul Rizal bin Zainal Abidin ("the third accused") and Mohamed Shawal bin Noordin ("the fourth accused") were jointly tried on the following amended charge:

Bahawa kamu pada 26 April 2005 jam lebih kurang 0001 pagi, di Tempat Letak Kereta, Flat Blok 4, Jalan PJS 6/3 B, Kampung Lindungan, Petaling Jaya, di dalam Daerah Petaling, dalam Negeri Selangor adalah ahli perhimpunan yang menyalahi undang-undang di mana tujuan bersama kamu adalah dengan sengaja menyebabkan cedera ke atas Mohammad Fitri bin Tajuddin (Kpt No: 800813-10-5391), dan semasa kamu semua ahli perhimpunan tersebut, seorang atau lebih daripada kamu dalam melaksanakan tujuan bersama kamu telah melakukan bunuh ke atas Mohammad Fitri bin Tajuddin iaitu satu kesalahan di mana ahli-ahli perhimpunan mengetahui mungkin dilakukan dalam melaksanakan tujuan bersama perhimpunan tersebut dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 149 Kanun Keseksaan dan boleh dihukum di bawah seksyen 302 Kanun yang sama.

[2] All the four accused claimed trial to the above amended charge.

[3] This case was heard on 4 August 2008 by the honourable judge ("the judge") at the High Court in Shah Alam. Just before cross-examination of the first prosecution witness, SP1, commenced, learned counsel for the first, second and third accused applied for postponement on the ground that he would like to make a representation to the public prosecutor on the charge. The case was

A then postponed. When the High Court in Petaling Jaya was established on 4 March 2009, this case was transferred to the said court to be heard by me.

B [4] On the first date of continued hearing before me on 12 May 2009, the prosecution applied for the case to be heard *de novo* on the ground that there were several discrepancies in the notes of evidence (“notes”) which could not be verified with the presiding judge there and then.

C [5] After hearing the oral submissions of both parties, I ordered that the case be heard *de novo* since there were some material discrepancies in the notes which caused misunderstanding of the evidence adduced so far. The notes were only 12 pages in total and hearing afresh on that same day would be speedier than adjourning to check the notes with the judge concerned.

D **Trial *De Novo* On Amended Charge**

E [6] The hearing of the case proceeded before me on 12 May 2009, 13 May 2009 and 14 May 2009. By then, the third prosecution witness, SP3, had already been cross-examined by learned counsel for the first, second and third accused but not by learned counsel for the fourth accused yet.

Alternative Charges

F [7] On the next date for continued hearing on 25 June 2009, the learned deputy public prosecutor (“the DPP”) tendered an alternative charge in respect of each of four accused.

[8] The first and fourth accused respectively were offered the following alternative charge:

G Bahawa kamu pada 26 April 2005, jam lebih kurang 12.01 tengah malam, di Tempat Letak Kereta, Flat Blok 4, Jalan PJS 6/3B, Kampung Lindungan, Petaling Jaya di dalam daerah Petaling, di dalam Negeri Selangor, dengan sengaja telah menyebabkan kecederaan ke atas Mohammad Fitri bin Tajuddin (Kpt: 800813-10-5391), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 323 Kanun Keseksan.

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[9] The second and third accused respectively were offered the following alternative charge:

I Bahawa kamu pada 26 April 2005, jam lebih kurang 12.01 tengah malam, di Tempat Letak Kereta, Flat Blok 4, Jalan PJS 6/3B, Kampung Lindungan, Petaling Jaya di dalam daerah Petaling, di dalam Negeri Selangor, telah menyebabkan kematian Mohammad Fitri bin

Tajuddin (KPT: 800813-10-5391), dengan mengetahui bahawa perbuatan kamu mungkin menyebabkan kematiannya, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(b) Kanun Keseksaan.

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[10] After the respective alternative charge has been read and explained to, and understood by each of the four accused, each Accused pleaded guilty and understood the nature and consequences of his plea.

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Facts Of The Case

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[11] Briefly, the facts of the case given by the prosecution are as follows:

1. Pada 24/4/2005, jam lebih kurang 9.30 malam, tertuduh Mohd Hafies bin Nordin (Tertuduh 1) bersama seorang rakannya telah bertemu dengan teman wanita kepada Mohammad Fitri bin Tajuddin (KPT: 800813-10-5391)(si mati) di Flat Blok 4, Jalan PJS 6/3B, Kampung Lindungan, Petaling Jaya, Selangor (tempat kejadian). Teman wanita si mati memberitahu Tertuduh 1 bahawa beliau akan membawa si mati ke Kampung Lindungan keesokan harinya. Setelah itu, mereka pun beredar.

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2. Pada 25/4/2005 jam lebih kurang 9.30 malam, tertuduh Mohd Shahrul bin Md Salleh (Tertuduh 2) dan Shahrul Rizal bin Zainal Abidin (Tertuduh 3) sedang berkumpul bersama-sama dengan 3 orang rakan mereka di padang Blok 5 Flat Minangkabau. Selang beberapa minit, Tertuduh 1 datang dan kemudiannya berbincang bersama-sama dengan Tertuduh 2 dan Tertuduh 3. Kemudian, sebelum Tertuduh 1 beredar, dia ada berkata kepada salah seorang rakannya bahawa "malam ini budak yang pukul saya minggu lepas di Kampung Baiduri akan datang dengan teman wanitanya" dan Tertuduh 1 telah menyuruh rakannya itu untuk menunggu di tingkat bawah Blok 3 Flat Minangkabau jam lebih kurang 11.55 malam.

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3. Pada jam 11.30 malam, Tertuduh 2, Tertuduh 3 dan 2 orang rakan mereka sedang berkumpul di tingkat bawah Blok 3 Flat Minangkabau. Kemudian si mati dan teman wanitanya tiba di sana dengan menaiki motosikal si mati. Teman wanita si mati mencari Tertuduh 1, namun Tertuduh 1 belum tiba. Si mati dan teman wanitanya pun beredar ke tempat letak kereta di Blok 4 (tempat kejadian).

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4. Pada 26/4/2005 jam lebih kurang 12.01 tengah malam, Tertuduh 1 pun tiba di tempat kejadian dan terus menuju ke arah si mati dan teman wanitanya. Sedang Tertuduh 1 dan si mati berbincang, tiba-tiba berlaku pergelutan dan tumbuk menumbuk di antara Tertuduh 1 dengan si mati.

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- A** 5. Menyedari pergelutan itu, Tertuduh 2 tampil dan merampas helmet motor berwarna putih dari tangan si mati lalu menghentak helmet tersebut ke kepala si mati dan helmet tersebut pun jatuh ke atas jalan. Kemudian, Tertuduh 3 turut tampil dan mengambil helmet yang jatuh tersebut dan digunakan untuk memukul si mati di kepala sehingga si mati terjatuh ke atas jalan. Kemudian,
- B** Tertuduh 1, Tertuduh 2 dan Tertuduh 3 pun beredar meninggalkan tempat kejadian.
6. Sewaktu si mati sedang terbaring di atas jalan, tertuduh Mohamed Shawal bin Noordin (Tertuduh 4) sampai di tempat kejadian lantas telah memukul dan menyepak si mati dengan menggunakan kaki dan tangan, dan kemudiannya beredar.
- C**
7. Si mati telah dikejarkan ke Hospital dan meninggal dunia beberapa hari kemudian. Laporan Autopsy si mati mengesahkan punca kematian si mati adalah disebabkan oleh "Cranio-cerebral damage (Head Injury) due to multiple impacts of blunt object(s)." Laporan Autopsy juga menunjukkan si mati turut mengalami kecederaan yang serius di seluruh badan, antaranya:
- D**
- 7.1 Multiple bruises and abraded bruises of irregular shape 15 cm x 9 cm over right side face, forehead, and head.
- E**
- 7.2 Multiple bruises and abraded bruises 9 cm x 4 cm over left side forehead and temporo-parietal region.
- 7.3 Multiple abraded bruises of irregular shape 13 cm x 10 cm over left side face and ear.
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- 7.4 Abraded bruises 3 cm x 2 cm over right nostril.
- 7.5 Abraded bruises 3.5 cm x 2.5 cm over both lips with teeth indentation in anterior part.
- 7.6 Abraded bruises 2 cm x 1 cm over bridge of nose, swelling underneath.
- G**
- 7.7 Multiple bruises of 10 cm x 4 cm over back and sides of head in occipital region.
- 7.8 Laceration 2 cm x 1 cm over occipital area, just lateral to occipital protuberance.
- H**
- 7.9 Multiple bruises of irregular and disc shaped in an area of 16 cm x 12 cm over front and sides of chest.
- 7.10 Multiple bruises and abraded bruise of 15 cm x 8 cm over back and front of right hand.
- I**
- 7.11 Multiple bruises 7 cm x 6 cm over scrotum.
- 7.12 Bruise 2 cm x 1 cm over lower inner of left thigh.

7.13 Bruise 7.5 cm x 4 cm over front and sides of left forearm and wrist.

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7.14 Multiple bruises 7.5 cm x 4 cm over dorsum of left hand.

7.15 Bruise 6 cm x 4 cm over back of left elbow.

7.16 Bruise 2 cm x 1 cm over left post axillary fold.

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8. Helmet putih yang digunakan sebagai senjata untuk memukul si mati di kepala telah pecah.

9. Berdasarkan keterangan yang ada, Tertuduh 1 dan Tertuduh 4 dengan sengaja telah menyebabkan kecederaan ke atas Mohammad Fitri bin Tajuddin (KPT: 800813-10-5391) (si mati) manakala Tertuduh 2 dan Tertuduh 3 telah menyebabkan kematian si mati dengan mengetahui bahawa perbuatan mereka berdua mungkin menyebabkan kematiannya.

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10. Oleh yang demikian, Tertuduh 1 dan Tertuduh 4 telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 323 Kanun Keseksan manakala Tertuduh 2 dan Tertuduh 3 telah melakukan homisid salah yang tidak terjumlah kepada membunuh yang boleh dihukum di bawah seksyen 304(b) Kanun yang sama.

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[12] Each of the four accused admitted to the facts and the exhibit ie, the helmet tendered by the prosecution. Accordingly, I found each of the four accused guilty and convicted each of the accused on his respective alternative charge.

Plea In Mitigation By Learned Counsel For The Fourth Accused

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[13] In mitigation, learned counsel for the fourth accused pleaded, *inter alia*, that it is trite law that the court should avoid imprisonment as far as possible for a first offender especially if he is of a young age (see *Tukiran Taib v. PP* [1955] 1 LNS 166). The fourth accused was only 19 years 10 months old at the time of the incident. The opening address of the DPP stated that about 15 - 20 persons were involved in the incident. Therefore, it was not only the fourth accused who had committed the offence. The cause of death was due to a blunt object impacting the victim's or deceased's head. It would be impossible for the fourth accused to inflict such large injuries to the deceased as contained in the autopsy report. The deceased was already lying down on his back when the fourth accused came to the scene. The fourth accused only "menyepak" the deceased. That was why the charge for murder has been reduced to that of voluntarily causing hurt under s. 323 of the Penal Code.

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- A [14] Learned counsel cited *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 and *PP v. Ravindran & Ors* [1992] 1 LNS 47 and urged the court to give a discount on the sentence since the fourth accused had pleaded guilty to the alternative charge. He suggested that all the accused, considering
B their young age, should be given a 1/3 discount on the sentence.

- [15] Learned counsel also submitted that the plea of guilt shows contrition and remorse on the part of the fourth accused. He informed the court that the parents of the fourth accused had been in court throughout the trial. The father of the fourth accused has undertaken to ensure that his son would not get into trouble in future.
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- [16] Learned counsel further submitted that the fourth accused was engaged in a pasar malam job in Puchong prior to his arrest. He was then earning RM300 per night and had contributed to his family income.
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- [17] The fourth accused is the eldest child and has five other siblings. The youngest is 12 years old. All of them are still schooling.
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Plea In Mitigation By Learned Counsel For The First, Second And Third Accused (“The Three Accused”)

- [18] Learned counsel made his plea in mitigation for the first, second and third accused simultaneously. He pleaded, *inter alia*, as follows:
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- [19] The first accused is now 25 years old. He was 20 years old at the time of the incident. He is the eldest of five children. At the time of the incident, he was working as a despatch clerk. The first
G accused only had Form 3 education. He had no previous convictions.

- [20] The second accused was 21 years old at the time of the incident. He is now 25 years old. He was a sub-contractor and is the fifth child out of a family of six children. The father of the
H second accused has retired. The second accused used to contribute his income to his family.

- [21] The third accused was 22 years old at the time of the incident. He is now 26 years old. At the time of the incident, the
I third accused was self-employed. He came from a family of five siblings. He only had Form 4 education.

- [22] The first, second and third accused are now very remorseful over their respective offence. This is shown by the fact that from as early as 18 June 2006, even before the trial commenced, the three accused had made a representation to the public prosecutor to reduce the charge to one under s. 323 of the Penal Code. After the trial had commenced, after hearing the evidence of SP1, again the three accused made another representation to the Public Prosecutor. In both representations, the three accused had accepted responsibility for their actions but not for the offence under s. 302 of the Penal Code. A B
- [23] What the first accused had inflicted was only a simple injury made in the course of fight. What he did was a normal reaction in a fight. C
- [24] The facts show that a struggle had taken place with the deceased. When the second accused saw that the first accused was in danger, he took the helmet and committed the act to save the first accused. The third accused followed the second accused. D
- [25] Not all the injuries inflicted on the deceased can be attributed to the three accused. The injuries are consistent with what 15 - 20 persons could inflict on the deceased. Since the other 15 - 20 persons were not charged, the benefit of the doubt should be given to the three accused. E
- [26] The principles in *Sau Soo Kim v. PP* [1975] 1 LNS 158 should be followed. No matter how hardened a criminal is, if there is a plea of guilt, then a discount should be given. The principles in *Abdullah Ang (supra)* and *Ravindran (supra)* are also to be adhered to. F
- [27] In *Ravindran (supra)*, even though there was an element of brutality in that a knife was used in the commission of the offence under s. 304(a) of the Penal Code, Visu Sinnadurai J only imposed a sentence of 8 years imprisonment. G
- [28] In this case, the second and third accused are charged under s. 304(b) of the Penal Code. The maximum term of imprisonment is ten years. Applying the principle in *Ravindran (supra)*, if a discount is given, only about four years imprisonment should be imposed. There is no element of brutality in this case as in *Ravindran (supra)*. H

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- A [29] With a discount of 1/4 or 1/3 of what would have been the sentence, as in *Abdullah Ang (supra)*, if the trial had proceeded fully, the sentence could possibly be six years imprisonment. However, since the second and third accused pleaded guilty, with the discount, the sentence should be four years imprisonment only.
- B [30] The three accused are young offenders with no previous convictions.
- C [31] The deceased came to Kampung Lindungan, the place where the three accused lived. The deceased actually came to look for trouble. The death of the deceased was contributed by his own act. The woman to be blamed ie, the deceased's girl friend is now no longer to be found.
- D [32] The three accused surrendered themselves to the authority of the Police upon seeing their names published in the newspapers.
- [33] Learned counsel pleaded for the date of sentence to run from the respective dates of arrest of the three accused.
- The DPP's Submissions**
- E [34] The opening address of the prosecution is not evidential and should not be taken into consideration unlike the facts of the case which are all admitted by the four accused. There is therefore no evidence that 15-20 persons were involved in the incident.
- F [35] In certain exceptional circumstances, the court can depart from the principle of 1/4 to 1/3 discount given to an accused who pleaded guilty. In this case, the court should consider that a life has been lost. Even though a knife had not been used, a helmet had been used. The helmet is also a brutal weapon and therefore there is an element of brutality here. The offence committed is a very serious offence. If the second and third accused were using the helmet to protect the first accused, then why was the deceased hit violently with the helmet on the head and not the body. The helmet broke. This shows that force was used until it was broken.
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- H [36] The facts have been admitted by the four accused. The facts show that there was a plan and the incident was not accidental.
- I [37] What the fourth accused did was beyond limits. The deceased was already lying down on the road and yet the fourth accused came and beat and kicked the deceased with his legs and hands.

[38] The DPP urged the court to take into consideration the fact that the life of a human being, an innocent person, was lost.

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Sentence

[39] I considered the above pleas and submissions. I agree with the prosecution that the opening address is not evidential. The court therefore has to rely on the facts of the case given by the prosecution witnesses thus far in the proceedings. However, I bear in mind that during the trial, in the course of the cross-examination of the prosecution witnesses, the defence suggested that about 15-20 persons might have been involved in the incident.

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[40] It is true that the four accused are young and are first offenders, with no previous convictions. However, considering the seriousness of the offence, it would not be possible to bind them over for good behaviour under s. 294 of the Criminal Procedure Code ("the CPC"). That would be absurd considering that the victim of the fight had lost his life in the whole incident, and the offence committed is not one of a trivial nature as envisaged by s. 294 of the CPC. Therefore, a custodial sentence would be proper based on the facts of the case.

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[41] The question now is what would be the appropriate sentence. The guiding principle of the 1/4 to 1/3 discount being given to an Accused who pleads guilty to an offence is not sacrosanct. It is merely a guiding principle which was restated in *Abdullah Ang (supra)* but it is not cast in stone. It is still subject to judicial discretion depending on the facts of the case. I am of the opinion that a discount ought to be given in appropriate cases to arrive at a sentence which is just and fair and which commensurates with the nature and gravity of the offence. The court has to do the fine balancing act of giving justice to the victim and his loved ones for loss of an innocent life, and of setting an example to society that crimes of this nature are considered grave offences and the offenders must be sufficiently punished for deterrent effect. At the same time, the court has the duty to take into account the pleas in mitigation and the fact that the four accused are now genuinely remorseful over the offence committed.

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[42] Based on the above, in respect of the first and fourth accused, even though they had pleaded guilty, they are in fact very fortunate to be charged only under s. 323 of the Penal Code for voluntarily causing hurt even though the victim has passed away. The punishment under s. 323 of the Penal Code is imprisonment which

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- A** may extend to one year, or with fine which may extend to two thousand ringgit, or both. I feel very strongly that even to give a discount of 1/4 to 1/3 out of the maximum sentence of 1 year imprisonment would render the whole sentence a real mockery considering that the victim died due to serious multiple injuries
- B** caused in the fight. Justice in this case demands that this court metes out the most adequate sentence. Accordingly, I sentenced the first and fourth accused to one year imprisonment ie, the maximum punishment provided by the section, with effect from the date of the arrest ie, 4 May 2005 and 9 May 2005 respectively.
- C** [43] As for the second and third accused, they were charged for the more serious offence of culpable homicide not amounting to murder under s. 304(b) of the Penal Code. The punishment under the same section is imprisonment which may extend to ten years, or with fine, or with both. I bear in mind that s. 304(b) also
- D** provides that the offence is for an act done with the knowledge that it is likely to cause death, but without intention to cause death, or to cause such bodily injury as is likely to cause death.
- E** [44] Since the maximum punishment under s. 304(b) is ten years imprisonment and not one year imprisonment as in s. 323 of the Penal Code, here I think a certain amount of discount that is slightly higher than the 1/4 or 1/3 discount recommended by case law should be given since the second and third accused had pleaded guilty. However, such sentence should be adequate and commensurate with the nature and gravity of the offence. It should
- F** also be sufficiently deterrent to the public. Accordingly, I sentenced the second and third accused each to seven years imprisonment with effect from the date of arrest ie, 4 May 2005.
- G** [45] To date no notice of appeal has been filed by any party regarding the above sentences.
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